IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

J U D G M E N T

S.B. CIVIL FIRST APPEAL NO.99/2000

Arjun Das Vs. Bhojraj

Against judgment and decree dated 09.03.2000 passed by Addl. District Judge No.2, Udaipur in Civil Original Suit No. 38/1994 - Bhojraj Bajaj (deceased) through Smt. Iswari Devi Vs. Arjundas.

DATE OF JUDGMENT :: 10th February,2006.

PRESENT

HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Mr. A.K. Acharya for appellant.
Mr. A.K.Rajvanshi for respondent.

BY THE COURT:

Challenging the judgment and decree dated 09.03.2000 passed by Addl. District Judge No.2, Udaipur in Civil Original Suit No. 38/1994 - Bhojraj Bajaj (deceased) through Smt. Iswari Devi

Vs. Arjundas, the appellant-defendant has approached this Court by filing the present appeal under Sec.96 CPC with the prayer to set aside the judgment and decree with costs or alternatively to remand the case back to the trial Court for its decision afresh as the learned trial Court has allowed the suit filed by plaintiff with cost holding the plaintiff entitled to the possession of 'A' part of the disputed plot as shown in the map and its owner, the defendant likewise has been held to be the owner of part 'B' and has been given the right to access to part 'B' through a four feet way from part 'A' so also held the plaintiff entitled to mesne profit @ Rs.500/- per month with interest @ 12% from 09.11.1987 till vacating and handing over the premises to plaintiff. Two months time was allowed for vacating and handing over the possession to the defendant and for getting his share on the ground floor in possession of plaintiff.

The facts in brief are that respondent-

plaintiff filed the suit against appellant-defendant, inter-alia, stating that the plaintiff and defendant are the real brothers, who had purchased a plot jointly for a consideration of Rs.20,000 from one Parasram and at the time of registry itself the said plot was parted in two shares; out of which plot No.103A of southern side remained with the plaintiff and Plot No.103B of north side was of the share of his younger brother defendant Arjundas. In the plaint, it is stated that both the brothers constructed house jointly. It is further stated that the accommodation of first floor was given to the defendant for staying out of affection temporarily for the reason of his being the younger brother of plaintiff, but when he was asked to vacate the premises given he did not do so even after giving notice through advocate. The plaintiff claimed vacant possession and mesne profit @Rs.500/- per month from the date of filing of the suit from defendant.

The defendant contested the suit and he

denied the averments of plaint. He stated that the house was constructed jointly and on advise of the people both the parties partitioned the house and ground floor of the house was decided to remain in the ownership of plaintiff and the first floor came in his share therefore he need not to vacate any part of the first floor.

The learned trial Court, on the basis of pleadings of parties, framed following issues:

(3) Whether the possession of the defendant on the premises detailed in para No.5 of the plaint is of a licencee temporarily ('Aryatan') and the plaintiff is entitled to get the possession back?

(4) Whether the plaintiff is entitled to receive compensation from defendant for the use and occupation of the disputed premises as rent @ Rs.500 per month?

(5) Relief?

To prove that the first floor of the house was given to the defendant benevolently due to affection but as the relation did not remain cordial the plaintiff is entitled to receive back

the possession, plaintiff presented himself as PW1 and made a statement that he had purchased plot No.103 through sale-deed for a consideration of Rs.20,000 out of which Arjundas had paid only Rs.8,000 and rest of the amount was paid by him. He has proved notice Ex.5 and Acknowledgement Due receipt Ex.6 and stated that despite notice the defendant did not vacate the premises. The plaintiff further stated that though their kitchens were separate, they remained in joint family till the relations were cordial but despite his best efforts to compromise the matter defendant did not cooperate and whatever was compromised between them was denied by him. Plaintiff in his cross-examination denied that the house was the joint property of brothers and mother purchased from the joint estate. He also denied that as per the compromise arrived at on 06.02.1987 both the brothers were in possession of their respective shares. He further denied the portion marked 'Y' having been given on licence to the defendant or his stating about bitterness in between them on

account of greed.

PW2 Bhagwandas is the witness who has witnessed the purchase of the plot. He has stated that plaintiff earlier helped Arjundas a lot but later on the behaviour of Arjundas changed and was not well towards plaintiff. He stated that 'A' portion of the house was of Bhojraj and 'B' portion of Arjundas and the registry is to this effect. He further stated that he tried to persuade Arjundas to handover the possession to Bhojraj. The witness in cross though could not tell the width and length of 'A' & 'B' portions of house but has clearly stated that the plaintiff and defendant each one have half share in the disputed plot.

PW3 also states about registry of the property for half share in favour of each of the two brothers. He has stated that Bhojraj was residing in the lower portion and defendant was in

upper portion. He has further stated that plaintiff Bhojraj was helping his brother defendant Arjundas like an elder brother. He also made a statement that after dispute having been cropped up in between them, efforts were made for compromise and plaintiff wanted the matter to be compromised but defendant used to back out from the compromise arrived at. He though could not exactly state the accommodation at ground floor as well as first floor but has stated clearly that the registry was joint in name of both the brothers.

PW4 Manoharlal states that the possession of the suit property with the parties was not as per the registry which was of half share of each of the brothers. He also stated that the plaintiff was issue-less and treated the defendant as his child. He further stated that his father used to go to the shop of plaintiff Bhojraj and the plaintiff & defendant were not in terms for last two years.

PW5 Sokatrai also states about two portions 'A' & 'B' in the registry and the front portion being of Bhojraj and the back portion of Arjundas. He has stated that plaintiff Bhojraj was looking after the children of defendant Arjundas like his own children but as he had grown in age, he told the defendant to take care of his children. The matter was complained in the Panchayat and efforts were made for compromise. In cross, the witness admitted the plaintiff and defendant to be his cousin brothers.

PW6 Jagdish Kumar tells about cordial relations between the parties before dispute. He has stated that 'A' portion of the suit property was of Bhojraj and Arjundas was having 'B' portion. The witness has stated that he did not stick to the decision of Panchayat and wanted to take possession forcibly. He further stated that at the time of filing suit Bhojraj was living in the lower part and the Arjundas in upper part.

As against this, from the side of defendant the sole defendant Arjundas appeared and stated that Plot No.103 was purchased in the name of Bhojraj and Arjundas and the same was partitioned in part 'A' & 'B' orally but in writing no document was executed till date. He has stated that the upper storey was got constructed by him at his own expense and started living on the first floor. He has also stated that his share on the ground floor was forcibly taken in possession by Bhojraj. He denied partition of the plot and stated that on the ground floor wife of plaintiff resides and if the plot is divided, either 55' x 20' or 40' x 27½' comes in his share. He also states that the sale-deed of this plot is in the name of both Bhojran and Arjundas. In cross examination, the defendant accepted that the sale deed was executed in favour of both the brothers however denied having seen the sale-deed after filing of the suit. He did not deny portion 'A" &

'B' in the map Ex.1A however stated that he could not say whether the sale-deed was registered or not as the same was not got prepared by him. He also showed his ignorance about the size of the rooms and denied the suggestion of Bhojraj helping him from 1941 to 1980. He accepted that he did not sent any notice for Bhojraj's having taken possession of the ground floor forcibly, nor given detail about that in the written statement nor complained to the police or the Panchayat. He denied his disagreement with the decisions of Panchayat all the times and refuted the suggestion that he being younger brother was given the upper portion of the house but later on his heart changed.

It has been contended by the learned counsel for the appellant that decree is not executable for the reason that in view of the construction made on the disputed premises separation is not possible. It has also been

contended that no portion like 'A' & 'B' were decided between the brothers and Ex.2, the map attached to the sale deed, infact is a fake one and in the reality the things are different and the upper portion which was constructed by him belongs to him and is in his share. It has also been submitted that mesne profits assessed by the Court are not liable to be decreed as the appellant was living in his portion.

On the other hand, the learned counsel for the respondent has supported the judgment and decree awarded by the learned trial Court. According to the learned counsel, the judgment passed by the trial Court is based on reasons and the appreciation of evidence has been made properly, therefore, the suit has been correctly decreed and no interference is required to be made by this Court.

I have considered the submissions made before me.

Having heard learned counsel for the parties, I find that following points require consideration in this case:

(1) Whether at the time when the property in dispute was purchased it was demarcated as 'A' & 'B' and the upper portion of the building is of the defendant?

(2) Whether the trial Court has rightly considered the matter in relation to mesne profits?

(3) Whether any interference is required in the judgment and decree passed by the Court below?

Point No.1 & 2 are inter-related, as such the same are being disposed of together.

Point No.1 & 2:

The trial Court recorded its finding in relation to Issue No.1 in favour of plaintiff and

held that the possession over the portion mentioned in Para 5 of the plaint was temporarily of the defendant and the plaintiff gave it for use for some time as the defendant was his brother. The trial Court has also held in relation to Issue No.1 that the suit property was purchased jointly by the brothers and they had equal share, portion 103A was of plaintiff and portion 103B of defendant-appellant.

A perusal of the evidence discussed hereinabove, go to show that almost all the witnesses have stated in one voice that the defendant-appellant and plaintiff are brothers, the property was purchased jointly though the plaintiff has stated that a sum of Rs.12,000/- was paid by him in consideration of the plot and Rs.8,000/- were of defendant. But this fact has not been established and the sale-deed establishes the fact that the property in dispute was purchased jointly, both plaintiff and defendant were having half share

each. Ex.A-1, when gone through, confirms the fact of purchase of the suit property from one Shri Parasram for a consideration of Rs.20,000 on 20.10.1970. At page 3 of Ex.1 sale-deed, which is duly registered, also states that at the time of sale, the property was divided and portion 103A came in possession of Bhojraj and portion 104B came in possession of appellant-defendant Arjundas. It is significant to mention here that Map Ex.2 attached with the sale-deed also defines the shares, which have been marked 'A' & 'B'. A perusal of Map Ex.2 further goes to show that on the upper storey, 'Y' is the portion, which according to the plaintiff was given to his brother temporarily out of love and affection for some time. Ex.2 clearly indicates portions 'A' & 'B' as separate. It also appears from Ex.2 that the plot has been divided exactly half and half between two brothers. The size of the plot is 55 x 40 and the half portion is with plaintiff and half with the defendant. A perusal of Ex.2 when seen in the light of Ex.1 sale-deed Ex.1, then there remains no

doubt about the fact that the premises in dispute were divided at the time of purchase by both the brothers and they occupied the same. Thus, two documents having been proved by tendering the same in evidence, nothing has been extracted in the cross examination to show that actually in the manner division was made in the sale-deed regarding shares did not take place. The contention of the learned counsel for the appellant that the upper portion was constructed by the defendant-appellant and was in his share is not tenable for the reason, firstly that after giving notice Ex.5 it was not replied and further no material has been brought on record to remotely prove the factum of construction made by him on the upper storey and that the portion of upper storey was not of plaintiff respondent. Defendant has examined himself and infact has admitted this fact that property was divided in two parts and part 'A' was of plaintiff. The witnesses have also stated that plaintiff was issueless and he on account of love and affection gave the upper portion of the house to his younger

brother to use the same for some time as previously both the brothers were having cordial relations but subsequently the defendant-appellant started harassing and also started maltreating him. Therefore, it appears that he asked the defendant to vacate the premises. Inspite of his repeated requests when the defendant did not vacate the premises, the suit has been filed. In the cross examination, he has admitted this position that in relation to allegation that Bhojraj has forcibly taken possession of the ground floor was never complained to anybody. He has also not denied the demarcation made in portions 'A' & 'B' of the map. There is no specific averment made in written statement in relation to forcibly occupying any portion by the plaintiff and as regards mesne profits is concerned, two rooms, kitchen etc. have been in possession of defendant-appellant and as discussed that the same were given for temporary use to the defendant and when he did not vacate after asking to vacate the same, the suit was filed and a notice was also sent making mention of all

material facts. The defendant has accepted in the last of the cross examination that it is correct to say that on the first floor of the house, the portion which is in his occupation could fetch rent @ Rs.500/- per month. He has denied that Bhojraj had given him the premises to live on account of his being younger brother.

In view of above oral evidence as well as documentary evidence brought on record, it is pure and simple case where two brothers have purchased the suit property and both of them were having equal share in the property by demarcation of the share at the time of purchase. A map was also annexed with the sale-deed showing their shares. In relation to the averments made in the written statement that the defendant made construction on the upper storey and that was of his share has not been proved at all. On the contrary, what has been proved is that portion marked 'A' was of plaintiff and portion marked 'B' in the site map mention of

which has been made in the sale-deed was of defendant. I do not find any merit in the contentions raised by the learned counsel for the appellant that the property is not liable to be divided in two separate parts. On the contrary, it appears from the material available on record that the property at the initial stage was divided in two brothers. The trial Court has discussed the oral as well as documentary evidence and there appears no infirmity in the impugned judgment and decree passed by the trial Court.

In view of the foregoing discussion, answer to Point No.1 & 2 is accordingly.

Point No.3:

In view of what has been discussed in relation to point No.1 & 2, there appears no illegality in the impugned judgment which may require interference by this Court and the judgment

and decree awarded by the trial Court requires no interference by this Court and deserves to be confirmed.

In the result, judgment and decree dated 09.03.2000 passed by Addl. District Judge No.2, Udaipur in Civil Original Suit No. 38/1994 – Bhojraj Bajaj (deceased)through Smt. Iswari Devi Vs. Arjundas is hereby confirmed and the appeal of the appellant is dismissed with costs.

(SATYA PRAKASH PATHAK)J.

/jpa